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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-701

ROADWAY EXPRESS, INC., *Petitioner,*

v.

J.D. MONK, PERCY GREEN, ROBERT McPHERSON

AND

ROBERT E. PIPER, JR., FRANK E. BROWN, JR., BOBBY STROMILE, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A, pp 1A-18) is reported at 599 F.2d 1378. The opinion of the District Court on rehearing (Pet. App. C, pp 11A-13A) is not reported. The opinion of the District Court (Pet. App. D, pp 14A-28A) is reported at 73 F.R.D. 411 (1977).

JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 1979. The petition for writ of certiorari

was filed on October 31, 1979 and the writ was granted on January 7, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

42 U.S.C. §2000e-5(k) provides:

> (k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. §1988 provides, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

QUESTION PRESENTED

Whether the provisions of the Civil Rights Act of 1964 §706(k) now 42 U.S.C. §2000e-5(k) and 42 U.S.C. §1988 can be merged with 28 U.S.C. §1927 so as to permit the assessment of attorney's fees against an attorney personally? If so, is it appropriate in this case?

STATEMENT OF THE CASE

J.D. Monk, Percy Green and Robert McPherson, individually and on behalf of other similarly situated blacks, filed suit on June 3, 1975 against Roadway Express, Inc. and the International Brotherhood of Teamsters and its Local No. 194 alleging employment discrimination. (R.1). The plaintiffs were represented by three black attorneys, Robert E. Piper, Jr., Frank E. Brown, Jr. and Bobby Stromile, respondents herein. This suit was filed after the receipt of right to sue letters by Monk, Green, and McPherson. (*See,* Exhibit Piper & Brown #1, #2, and #3 introduced at hearing on October 5, 1976). Monk and McPherson received findings of probable cause of discrimination in hiring by the EEOC. (*See,* Exhibit Piper & Brown #1 and #3).

On September 2, 1975, discovery was commenced by plaintiffs propounding interrogatories to Roadway. (R.37). On January 5, 1976, Roadway answered these interrogatories and on the same date, propounded interrogatories to the plaintiffs. (R.113).

On April 13, 1976, Roadway filed a motion requesting an order to be issued by the Court compelling plaintiffs to answer these interrogatories. (R.253). Magistrate James Barton on April 22, 1976, ordered that the interrogatories propounded by Roadway to the plaintiffs be answered on or before May 24, 1976 and denied a request by Roadway for an assessment of attorney's fees and expenses. (R.259).

Contemporaneous to Magistrate Barton's decision, Roadway noticed the depositions of the named plaintiffs to be taken on May 6 and May 7, 1976. The depositions of Monk and Green were taken. Attorneys for plaintiffs could not locate Mr. McPherson; he was not served with a subpoena compelling his attendance at the deposition; and his deposition was not taken. (R. 350). On June 14, 1976, Roadway filed a motion to dismiss the complaint of J.D. Monk, et al, for failure to answer interrogatories. This motion was filed pursuant to Rule 37(d) of the Federal Rules of Civil Procedure and requested reasonable expenses, costs of court, and attorney's fees in connection with defendant's failure to make discovery. (R.343). On June 30, 1976, the District Court dismissed the case without prejudice, retaining jurisdiction as far as sanctions were concerned. (R.558).

An evidentiary hearing was held on October 5, 1976 (R.698) and on January 6, 1977, the Honorable Ben C. Dawkins, Jr., Senior United States District Judge, rendered a decision awarding attorney's fees and costs against Robert E. Piper, Jr., Frank E. Brown, Jr., and Bobby Stromile. (R.740). A motion for a rehearing was filed (R.755) and on April 13, 1977, said motion for rehearing was denied. (R.787).

On May 5, 1977, a judgment was rendered in favor of Roadway Express and against Robert E. Piper, Jr., Frank E. Brown, Jr. and Bobby Stromile awarding attorney's fees and costs against them in the amount of $17,372.53. (R. 790). On May 25, 1977, an amended judgment was filed in which the claim of Roadway for the assessment of attorney's fees against Monk, Green,

and McPherson was dismissed, with prejudice. (Pet. App. B, at pp. 9a-10a). Respondents appealed the award of attorney's fees to the United States Court of Appeals, Fifth Circuit. Roadway did not appeal the denial of an assessment of attorney's fees against Monk, Green, and McPherson.

The United States Courts of Appeals for the Fifth Circuit found that the District Court's determination concerning the vexatiousness of the respondents' behavior was not clearly erroneous but did determine that attorney's fees could not be considered part of the "excess costs" under 28 U.S.C. §1927. Accordingly, the Court of Appeals vacated the judgment of the District Court and remanded the case for further proceedings consistent with its opinion. (Pet. App. A, p. 1a-8a).

The Fifth Circuit concluded that attorney's fees were not contemplated as "costs" under §1927. It was observed that §1927 was penal in nature and therefore subject to the rule of strict construction. The Court relied on the following language from *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714, 720 (1967) in reaching its decision:

> "When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied." *Id.* at 720.

The Court also noted, relying on *Christiansburg Garment Co.* v. *EEOC,* 434 U.S. 412 (1978), that 42 U.S.C. §§1988 and 2000e-5(k) permitted the assessment of attorney's fees against unsuccessful parties but not against attorneys of those parties. Furthermore, the Court concluded that the District Court could not "combine the provisions of those statutes (§§1988 and 2000e-5(k)) with those of §1927 to produce a hybrid result contemplated by none of the statutes." (Pet. App. A., p. 8a).

SUMMARY OF THE ARGUMENT

I

42 U.S.C. §§2000e-5(k) and 1988 should not be merged with 28 U.S.C. §1927 to reach a result not contemplated by any of the statutes. 42 U.S.C. §§2000e-5(k) and 1988 allow the recovery of attorney's fees to the "prevailing party" but do not provide authority for assessing the fees against the opposing attorney. 28 U.S.C. §1927 allows the Court to assess "excess costs" against an attorney who engages in vexatious conduct. The statute does not provide for the inclusion of attorney's fees. As was noted by the Fifth Circuit, the provisions of these statutes should not be combined to "produce a hybrid result contemplated by none of the statutes." (Pet. App. A, p. 8a). Further evidence of the fact that §1927 does not include attorney's fees is the Bill passed by the Senate, S.390, 96th Congress, First Session, which seeks to amend 28 U.S.C. §1927 to allow the recovery of attorney's fees.

An award of attorney's fees under 42 U.S.C. §2000e-5(k) against the plaintiff in a Title VII case is governed by the decision in *Christiansburg Garment Co.* v. *EEOC,* 434 U.S. 412 (1978). Under *Christiansburg* the Court must determine that the plaintiff's claim was "frivolous, unreasonable, or groundless" before liability for attorney's fees can be imposed. In this case there was no such finding and the only findings were with regard to the conduct of the plaintiff's attorneys. Accordingly there is no basis, even under plaintiff's theory, to enlarge the definition of "costs" under §1927.

II

28 U.S.C. §1927 establishes statutory penalties that may be used by the court to punish lawyers. Because the statute is penal in nature, it is subject to the rule of strict construction and unless the language of 28 U.S.C. §1927 "plainly and unmistakably" allows an award of attorney's fees as part of the "costs" the construction of the statute must be construed in favor of the respondents in this matter. *United States* v. *Bass,* 404 U.S. 336 (1971).

III

The judiciary does not have a free hand in allowing attorney's fees as costs. *Alyeska Pipeline Services* v. *Wilderness Society,* 421 U.S. 240 (1975). 28 U.S.C. §1927 does not state that attorney's fees can be awarded as part of the costs. The cases interpreting the statute have held likewise.

ARGUMENT

I. 42 U.S.C. §§2000e-5(k) And 1988 Should Not Be Merged With 28 U.S.C. §1927 To Reach A Result Not Contemplated By Any Of The Statutes.

A. Neither 42 U.S.C. §§2000e-5(k) and 1988 nor 28 U.S.C. §1927 allow recovery of attorney's fees against the attorney.

Petitioner argues that 42 U.S.C. §§2000e-5(k) and 1988 should be combined with 28 U.S.C. §1927 to reinstate the District Court's award of attorney's fees as a part of the "costs" against the attorneys who

represented J.D. Monk, Percy Green, and Robert McPherson.[1]

Petitioner urges this Court to read these statutes and interpret them in accordance with their "plain meaning".[2] The plain meaning of none of the statutes reaches the result suggested by petitioner. 42 U.S.C. §§2000e-5(k) and 1988 allow the Court, in its discretion, to award "the prevailing party" a "reasonable attorney's fee." These statutes clearly do not allow the award of attorney's fees against the opposing attorney, nor was it the intent of Congress to reach this result.

42 U.S.C. §2000e-5(k) was originally enacted as §706(k) of Title VII of the Civil Rights Act of 1964. The legislative history indicates that a primary intent of the attorney's fees provision was to "make it easier for a

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[1] 28 U.S.C. §1927 provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

42 U.S.C. §2000e-5(k) provides:

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee a part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. §1988 provides, in pertinent part:

In any action or proceeding to enforce a provision of §§1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[2] Brief for Petitioner, p.7.

plaintiff of limited means to bring a meritorious suit."[3] In *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968), this Honorable Court recognized this congressional intent in dealing with the attorney's fees provision under Title II of the Civil Rights Act of 1964 which is virtually identical to §706(k) of Title VII. In *Piggie Park* it was noted that the plaintiff was acting as a "private attorney general" and was "vindicating a policy that Congress considered of the highest priority." If attorney's fees were not awarded it was concluded that the public interest would not be properly advanced. *Id.* at 401-402. The reasoning of *Piggie Park* was made applicable to cases pending under Title VII in *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 415 (1975).

This Court in *Christiansburg Garment Co.* v. *EEOC,* 434 U.S. 412 (1978) also recognized the intent of Congress to "protect defendants from burdensome litigation having no legal or factual basis." *Id.* at 418-419. Petitioner has urged that assessing attorney's fees under 42 U.S.C. §§2000e-5(k) and 1988 is "consistent with congressional intent" and refers specifically to the Senate debates on §1988 as supporting this contention.[4] The Senate Report accompanying the Bill which became §1988 as amended, the Civil Rights Attorney's Fees Awards Act, makes it clear that the award is to be made against the party, not against the party's attorney. Senate Report 94-1011, 94th Congress, Second Session stated that "this bill thus deters frivolous suits by authorizing an award of attorney's fees against a *party* shown to have litigated in 'bad faith'," (at p. 5) (emphasis added).

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[3] Remarks of Senator Humphrey, 110 Cong. Rec. 12724 (1964).

[4] Brief for Petitioner, p.10-11, fn

Moreover, the Supreme Court's discussion in *Christiansburg Garment Co.* v. *EEOC,* supra, of allowing of the award of attorney's fees to a prevailing party is based on the award being assessed against the party. See, e.g., 434 U.S. at p. 422. Nowhere in the decision does this Court suggest that attorney's fees might be assessed against attorneys. It is respectfully submitted that neither a reading of 42 U.S.C. §§2000e-5(k) and 1988, nor a review of the legislative history, nor a review of the case law interpreting the statutes authorizes a Court to tax attorney's fees against attorneys representing their clients.

Despite the admittedly scant legislative history of 28 U.S.C. §1927, petitioner suggests that "from the very beginning, attorney's fees were within the perview of §1927."[5] This suggestion is misleading and irrelevant because until 1853 attorney's fees were generally charged to the losing parties along with other costs. *Alyeska Pipeline Service* v. *Wilderness Society,* 421 U.S. 240, 251 (1975). The general statutory rule establishing what items are taxable as cost was changed with the enactment of Act of February 26, 1853, 10 Stat. 161 and the amendments thereto which are now embodied in 28 U.S.C. §1920. It does not include attorney's fees.[6]

Petitioner also places reliance on the decision in *Motion Picture Patents Company* v. *Steiner,* 201 F.63 (2nd Cir., 1912). This early decision makes it clear that

[5] Brief for Petitioner, p.12.

[6] This history is discussed in detail in *Alyeska Pipeline Service* v. *Wilderness Society,* 421 U.S. 240, 247-256. See also *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714, 720; *Lockett* v. *Hellenic Sea Transports Ltd.,* 60 F.R.D. 469 (E.D. Pa. 1973); *Twentieth Century Fox Film Corp.* v. *Goldwyn,* 328 F.2d 190 (9th Cir. 1964) for the definition of "costs".

the Court has little discretion with regard to what may be allowed as costs and what those costs include. First, it was noted that the Court could not require the offending attorney to pay "all the costs, but only the excess of costs, which excess was occasioned by his unreasonable and vexatious conduct." *Id.* at p. 64. In an obvious reference to the narrow definition of costs under Rev. Stat. §823 and 824[7] the Court noted:

> "Unquestionably the laws of New York are much more liberal in the matter of costs and allowances than those of the United States, where the costs are hardly more than nominal."

In addition to the history of the statute and prior interpretations, this Honorable Court should consider the chapter and title in which §1927 is located as further evidence that attorney's fees are not contemplated in an award of costs against attorneys pursuant to this statute. This statute is located in Chapter 123—"Fees and Costs", and in that chapter costs are defined under §1920.[8] Had Congress intended to include a broader

[7] Discussed in *Alyeska Pipeline Services* v. *Wilderness Society,* 421 U.S. 240, 254-255 at footnotes 25, 26, 27, 28, and 29.

[8] 28 U.S.C. §1920, Taxation of Costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under §1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under §1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

definition of "costs" in §1927 than was contained in Chapter 123, it could have easily so indicated.

Further evidence of Congress' lack of intent to include attorney's fees within the provisions of §1927 is evidenced by a bill currently pending before Congress, S. 390 96th Congress, First Session.[9] The act, entitled "Anti-Trust Procedural Improvements Act of 1979", amends 28 U.S.C. §1927 to read as follows:

> "(a) Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who intentionally engages in conduct unreasonably and primarily for the purpose of delaying or increasing the cost of the litigation may be required by the court to satisfy personally the excess costs, expenses and *attorney's fees* reasonably incurred because of such conduct.
>
> "(b) Costs, expenses, and attorney's fees shall be imposed under this section upon motion of any party only after a hearing, held after trial.
>
> "(c) No such costs, expenses, and attorney's fees shall be imposed unless the attorney continues to engage in conduct which is deemed to violate this section after having been previously warned by the court that continuation of such conduct would result in the imposition of such costs, expenses and attorney's fees."[10] (emphasis added).

[9] This bill was passed by the Senate and referred to the Committee on the Judiciary, in the House of Representatives, July 24, 1979. The House bill amending 28 U.S.C. §1927 is H.R. 4047, 96th Congress, First Session. The subcommittee hearings on both the Senate and House bills indicate that attorney's fees are not included in 28 U.S.C. §1927, as it is presently written. U.S. Congress. Senate. Committee on the Judiciary; hearings before Subcommittee on Antitrust and Monopoly on "Antitrust Procedural Improvements Act of 1979". S. 390, February 20 and 26, 1979; Washington U.S. Government Printing Office 1979. U.S. Congress. House. Committee on the Judiciary; hearings before Subcommittee on Monopolies and Commercial Law on "Antitrust Procedural Improvements and Jurisdiction Amendments". H.R. 3271; 4046; 4047; 4048; 4049; 4050; May 31, September 27, and November 8, 1979. Washington: U.S. Government Printing Office 1979.

Had the meaning of this statute been so plain as contended by the petitioner and had the intent of Congress been so clear to include attorney's fees under §1927, then obviously there would have been no need for the Senate to pass a bill amending §1927.[11] Furthermore, if Congress had intended the merging of statutes which allow the granting of attorney's fees, such as 42 U.S.C. §2000e-5(k) and §1988 with §1927, there would have been no need for the proposed amendments to §1927 by the Anti-Trust Procedure Improvement Act. This is because 15 U.S.C. §15 provides that "any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust Laws may sue therefor . . . and shall recovery threefold the damages by him sustained, *and the cost of suit, including a reasonable attorney's fee.*" (emphasis added). Thus, according to petitioner's argument, 15 U.S.C. §15 could be merged with §1927 to obtain the desired result. Considering the foregoing, it is respectfully submitted

[10] See generally, Report to the President and the Attorney General of the National Commission for the Review of Anti-Trust Laws and Procedures, 80 F.R.D. 509 (1979).

[11] The Report of the Committee of the Judiciary of the United States Senate 96-238, 96th Congress, 2nd Sess., accompanying the Bill, Anti-Trust Procedure Improvements Act of 1979 stated:

> "Second, Section 4 broadens the range of increases expenses which an attorney who engages in dilatory litigation practices may be required by the judge to satisfy personally. Section 1927 currently refers to 'excess costs.' This language has been construed to be limited to the narrow category of taxable costs, such as filing fees. Section 4 expands this language to allow the judge to order an attorney to satisfy personally 'excess costs, expenses, and attorney's fees reasonably incurred because of such (dilatory) conduct.' "

that Congress certainly did not state, nor was it the intent of Congress to allow an award of attorney's fees against an attorney pursuant to 42 U.S.C. §§2000e-5(k) and 1988 nor was it intended that "excess costs" under 28 U.S.C. §1927 include attorney's fees.

B. §2000e-5(k) and §1988 deal with the merits of plaintiff's claim; §1927 deals with the conduct of the lawyer.

Under the theory advanced by petitioner in its brief, an award of attorney's fees assessed against the lawyer in this case is predicated on an initial finding of liability under §§2000e-5(k) and 1988 and the merging of this finding with §1927 to allow an award against the attorney. This Court has held in *Christiansburg Garment Co.* v. *EEOC,* supra, that attorney's fees can only be awarded under §2000e-5(k) to the "prevailing party"[12] and that attorney's fees should not be assessed against the plaintiff "unless a Court finds that his claim was frivolous, unreasonable, or groundless, or that plaintiff continued to litigate after it clearly became so." 434 U.S. at p. 422. There was no finding by the District Court that the claims of the plaintiffs were "frivolous, unreasonable, or groundless." The only finding made by the District Court was with regard to the conduct of the attorneys. (Pet. App. p. 14a-28a). The District Court never made any determination of the plaintiff's claims on the merits and dismissed the case without prejudice. (R.558).

Contrary to the requirement of *Christiansburg* that the plaintiff's claim be frivolous, unreasonable, or

[12] It is interesting to note that under petitioner's theory of statutory construction, no attorney's fees could be assessed under §1927 against an attorney representing the prevailing party.

groundless, the determination letters of the EEOC with regard to the claims of Monk and McPherson, (*See,* Exhibit Piper & Brown #1 and #3 introduced at hearing on October 5, 1976) indicate a finding of probable cause of discrimination in hiring practices.[13] It is evident that the record in this matter does not provide a sufficient basis for the establishment of an award of attorney's fees against the plaintiffs under the *Christiansburg* rule.[14] Accordingly, if there is no basis for an award of attorney's fees under 42 U.S.C. §§2000e-5(k) and 1988, then there is no basis for enlarging the definition of "costs" under §1927 which deals with the conduct of lawyers. In other words, even if one could merge the provisions of 42 U.S.C. §§2000e-5(k) and 1988 with 27 U.S.C. §1927, there is no basis in the record for a finding of liability against the plaintiffs, Monk, Green and McPherson.[15]

[13] The finding of reasonable cause by the EEOC is only made for a relatively small number of charges filed with the EEOC. A survey of 98,135 charge resolutions from July 1, 1972 through March, 1975 showed that there were 21,905 cause findings or only 22.3%. There were no cause findings for 16.3% of the charges, consolidation accounted for 1.8% of the charges, administrative closures for failure to proceed in 47.7%, administrative closure for no jurisdiction in 11.9%. *Report to the Congress by the Comptroller General of the United States,* "The Equal Employment Opportunity Commission Has Made Limited Progress in Eliminating Employment Discrimination", (Sept. 28, 1976) at p.12.

[14] A strong argument can be made that Roadway is not a "prevailing party." *Grubbs* v. *Butz,* 548 F.2d 973 (D.C. Cir. 1976).

[15] It should be noted that Roadway did not appeal the District Court's failure to assess attorney's fees against Monk, Green, and McPherson. (Pet. App. B, p.9a).

II. 28 U.S.C. §1927 Is Penal In Nature And Must Be Narrowly Construed.

28 U.S.C. §1927 establishes statutory penalties that may be used by the Court to punish lawyers who engage in vexatious conduct. Although this is not a criminal statute, it is required to be construed with the same strictness as other statutes of Congress which impose penalties. *Top Value Meats, Inc.* v. *F.T.C.*, 586 F.2d 1275, 1282 (1978); *Schwartz* v. *Romnes,* 495 F.2d 844 (2nd Cir., 1974). In outlining the requirement of strict construction when dealing with a penal statute, the Court noted in *Schwartz* that the need for strict construction is especially compelling when the application of a statute may result in the infringement of First Amendment Rights under the United States Constitution. *Id.* at 849. The right of a client to vigorous and effective representation is one protected by the First Amendment. *NAACP* v. *Button,* 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia,* 377 U.S. 1 (1974).

The strict construction of a statute which imposes penalties protects the person being penalized from unfair surprise, provides an adequate warning of the punishment and requires that ambiguities in the statute are to be resolved in favor of leniety. *United States* v. *Bass,* 404 U.S. 336, 347-348 (1971). Application of the requirement of strict construction to 28 U.S.C. §1927 requires adherence to the specific language of the statute. The statute provides that an attorney who "so multiplies the proceedings in any case as to *increase costs* unreasonably and vexatiously may be required by the Court to satisfy personally such *excess costs.*" The statute does not mention the assessment of attorney's fees against the attorney who acts unreasonably. It cannot be said that Congress has "plainly and unmistakably," as required by *U.S.* v. *Gradwell,* 243 U.S. 476, 485 (1917), provided authority for the Court to assess attorney's fees against an attorney under §1927. Therefore, because ambiguity exists, the doubt must be resolved in favor of the respondents in this matter.[16] This was the conclusion reached by the Fifth Circuit relying on *U.S.* v. *Ross,* 535 F.2d 346 (6th Cir., 1976) and *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714 (1967).

III. "Costs" As Referred To In 28 U.S.C. §1927 Does Not Include Attorney's Fees.

Under the "American rule" as discussed in *Alyeska Pipeline Services* v. *Wilderness Society,* 421 U.S. 240, the prevailing party may not recover attorney's fees as costs or otherwise.[17] As noted in *Alyeska,* Congress has not extended "any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted," *Id.* at p. 260. There have been other cases preceding and following *Alyeska* in which this court has refused to allow an award for attorney's fees unless expressly authorized by statute. *Fleischmann* v. *Mayer Brewing Co.,* 386 U.S. 714 (1967); *F.D. Rich Company* v. *Industrial Lumber Co.,* 417 U.S. 116 (1974); *Runyon* v. *McCrary,* 427 U.S. 160 (1976). In the above cases this court has made it

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[16] This Court has recently rejected an attempt in a criminal case to engraft one statute to another statute and thus produce a more severe penalty than originally allowed by the first statute alone. *Simpson* v. *U.S.,* 435 U.S. 6 (1978).

[17] The exceptions to this rule are: 1) applicable statutory authorization for attorney's fees; 2) an award for attorney's fees against a *party* who has acted in bad faith; and 3) the exception based on the "common benefit" theory. 421 U.S. 245.

clear that attorney's fees would not be awarded in a case unless there was clear statutory authority to allow such fees. Such statutory authority is not provided in the language of §1927.

The District Courts and Courts of Appeal which have fully considered whether attorney's fees should be awarded pursuant to §1927 have all concluded that §1927 does not permit the taxing of any additions, such as attorney's fees, over "regular costs". *1507 Corporation* v. *Henderson,* 447 F.2d 540 (7th Cir. 1971); *United States* v. *Ross,* 535 F.2d 346 (6th Cir. 1976); *Kiefel* v. *Las Vegas Hacienda, Inc.,* 404 F.2d 1163 (7th Cir. 1969); *Exhibitors Poster Exchange, Inc.* v. *National Screen Service Corp.,* 78 F.R.D. 192 (E.D.La. 1978); *Chrysler Corp.* v. *Lakeshore Commercial Finance Corp.,* 389 F.Supp. 1216 (E.D.Wis. 1975), aff'd 549 F.2d 804 (7th Cir. 1977).[18]

Petitioner cites a number of cases at the end of its brief which it says stand for the proposition that courts "possess inherent power to include attorney's fees as costs under §1927." None of the cases cited by petitioner at pages 19 and 20 of its brief allowed recovery for attorney's fee under §1927. The recognized "bad faith" exception to the "American rule" referred to by petitioner and noted in *Alyeska Pipeline Service* v. *Wilderness Society,* 421 U.S. 240, 258-259 allows an award of fees against the party but there is no reference

[18] Petitioner contended in its brief in support of its petition for a writ of certiorari that there was a split between the circuits as to whether attorney's fees could be awarded pursuant to 28 U.S.C. §1927. Petitioner has not made that argument in its most recent brief.

to the allowance of such award against an attorney.[19] It is submitted that petitioner has failed to present authority to support his contention that "cost" pursuant to §1927 includes attorney's fees.

CONCLUSION

The decision of the Court of Appeals vacating the judgment of the District Court and determining that attorney's fees could not be considered part of the "excess cost" under 28 U.S.C. §1927 was eminently correct and should be affirmed.

Respectfully submitted,

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[19] Attorney's fees may be authorized as part of the fine to be delivered on the defendant. *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U.S. 299, 426-428 (1923); See also recognition of this authority *F.D. Rich Co.* v. *Industrial Lumber Co.,* 417 U.S. 116, 219.